Esso Production (M) Inc v Maimunah bte Ahmad & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–88 OF 1997

HAIDAR FCJ, MOKHTAR SIDIN AND ABDUL KADIR SULAIMAN JJCA

2 NOVEMBER 2001

Labour Law *— Employment — Dismissal — Lack of material particulars in charges against employee — Admission by employee to defective charges — Validity of charge could be raised at any stage of proceedings — Whether charge void ab initio — Whether on appeal court should only consider merits of case and not validity of charges*

This was an appeal from the decision of the High Court dismissing the application of the appellant for certiorari to quash the award of the second respondent (the Industrial Court) No 132 of 1997 dated 25 March 1997. The award arose out of a reference made by the Minister of Human Resources under s 20(3) of the Industrial Relations Act 1967 ('the Act') relating to the dismissal of the first respondent by the appellant, effective from 26 March 1992. It was the second respondent's decision that the appellant charged the first respondent only based upon suspicion and speculation and thus it was baseless without just cause and excuse. The High Court held that the charges, criminal or semi-criminal in nature, did not contain the material particulars of the date, time and place of the offence and was void ab initio. Before this court, counsel for the appellant contended that it was irrelevant for the High Court judge to consider that issue as the first respondent admitted to the facts and only the merits should be considered.

Held, dismissing the appeal with costs and reaffirming the decision of the High Court:

(1) The court could not agree with the contention of the learned counsel that it was irrelevant for the High Court judge to consider the issue of the lack of particulars in the charge. The issue was whether the first respondent in the first place was dismissed by the appellant on 26 March 1992 with just cause or excuse. To justify the dismissal, the burden was on the appellant to satisfy the tribunal empowered to adjudicate the matter that such dismissal was with just cause or excuse. It was not for the first respondent to prove otherwise (see pp 462G, I–463A).

(2) The validity or otherwise of the charges put before the internal board of inquiry was the pivotal issue in this matter. The learned judge was correct when he said that it could be raised at any stage of the proceedings in the matter. The two charges labeled against the first respondent during the inquiry were indeed criminal or at least semi-criminal in nature and the substance relating to the two charges could not be brushed aside as being of no significance. On

A the two charges, the burden was on the party that alleged to satisfy the tribunal adjudicating the matter that the charges had been proved before the first respondent could be condemned. They were material particulars required to be disclosed in the charges. The validity or otherwise of the charges was the threshold of the matter before the merits could be considered. The two charges, as B they stood, were bad and the learned judge was therefore correct when he said that such charges for want of the material particulars was void ab initio. With that, the finding of guilt upon the first respondent could not stand, thereby rendering the dismissal of the first respondent by the appellant to be without just cause or C excuse and therefore, unlawful (see pp 463E–464B).

(3) The court need not look into the merits to find fault with the findings of the learned judge in dismissing the application (see p 465B).

D [**Bahasa Malaysia summary**

Ini adalah rayuan daripada keputusan Mahkamah Tinggi menolak permohonan perayu untuk certiorari membatalkan award responden kedua (Mahkamah Perusahaan) No 132 tahun 1997 bertarikh 25 Mac 1997. Award tersebut timbul berdasarkan rujukan Menteri Sumber E Manusia di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('Akta tersebut') berhubung pemecatan responden pertama oleh perayu, yang berkuatkuasa pada 26 Mac 1992. Adalah keputusan responden kedua bahawa perayu telah menuduh responden pertama dengan hanya berdasarkan syak wasangka dan agakan dan oleh itu tidak berasas tanpa sebab dan alasan yang adil. Mahkamah Tinggi telah F memutuskan bahawa pertuduhan tersebut, yang bersifat jenayah dan separa-jenayah, tidak mengandungi butir-butir penting tentang tarikh, masa dan tempat kesalahan tersebut dan adalah tidak sah ab initio. Di hadapan mahkamah ini, peguam bagi pihak perayu menegaskan bahawa ia adalah tidak relevant untuk hakim Mahkamah Tinggi mempertimbangkan persoalan tersebut kerana responden G pertama telah mengakui fakta-fakta tersebut dan hanya merit yang sepatutnya dipertimbangkan.

Diputuskan, menolak rayuan tersebut dengan kos dan mengekalkan semula keputusan Mahkamah Tinggi:

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(1) Mahkamah tidak bersetuju dengan hujah peguam yang arif bahawa adalah tidak relevan untuk hakim Mahkamah Tinggi mempertimbangkan persoalan tentang kekurangan butir-butir di dalam kertas pertuduhan. Persoalannya adalah sama ada responden pertama pada mulanya telah dipecat oleh perayu pada I 26 Mac 1992 dengan sebab dan alasan yang adil. Untuk menjustifikasikan pemecatan tersebut, beban terletak di atas perayu untuk memuaskan tribunal yang diberi kuasa untuk

mengadili perkara tersebut bahawa pemecatan tersebut adalah dengan sebab dan alasan yang adil. Ia bukan untuk responden pertama membuktikan sebaliknya (lihat 462G, I–463A).

(2) Kesahihan atau sebaliknya pertuduhan-pertuduhan yang dikemukakan di hadapan lembaga siasatan dalaman adalah persoalan yang penting dalam perkara ini. Hakim yang arif adalah betul apabila beliau berkata bahawa ia boleh ditimbulkan pada mana-mana peringkat prosiding dalam perkara tersebut. Kedua-dua pertuduhan yang dibuat terhadap responden pertama semasa siasatan sememangnya bersifat jenayah atau sekurang-kurangnya separa-jenayah dan kekukuhan berhubung kedua-dua pertuduhan tersebut tidak boleh diketepikan sebagai tidak mempunyai apa-apa maksud. Berdasarkan kedua-dua pertuduhan tersebut, beban terletak di atas pihak yang mendakwa untuk memuaskan tribunal yang mengadili bahawa pertuduhan-pertuduhan telah dibuktikan sebelum responden pertama boleh dijatuhkan hukuman. Wujud butir-butir yang penting yang perlu untuk didedahkan dalam pertuduhan-pertuduhan tersebut. Kesahihan atau sebaliknya pertuduhan-pertuduhan tersebut adalah penting sebelum merit boleh dipertimbangkan. Kedua-dua pertuduhan tersebut, sebagai mana di sini, adalah cacat dan hakim yang arif oleh itu adalah betul apabila beliau berkata bahawa pertuduhan-pertuduhan sebegini yang tidak mempunyai butir-butir penting adalah tidak sah ab initio. Oleh itu, penemuan bersalah oleh responden pertama tidak kekal, dengan itu mengakibatkan pemecatan responden pertama oleh perayu tanpa sebab atau alasan yang adil dan oleh demikian, menyalahi undang-undang (lihat ms 463E–464B).

(3) Mahkamah tidak perlu melihat kepada merit untuk mencari kesilapan dalam penemuan hakim yang arif dalam menolak permohonan tersebut (lihat ms 465B).]

[*Editorial Note*: The appellant's application for leave to appeal to the Federal Court (before Ahmad Fairuz Chief Judge (Malaya), Siti Norma Yaakob and Mokhtar Abdullah FCJJ) was dismissed with costs on 22 April 2002.]

Notes

For cases on dismissal generally, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 813–832.

Cases referred to

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1995] 1 MLJ 481 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(1), (3)

Appeal from: Originating Motion No R–25–71 of 1997 (High Court, Kuala Lumpur)

Andrew TC Saw (*Edward Saw* with him) (*Ng Yook Woon, Andrew TC Saw & Co*) for the appellant.

LG Seah (*Adele Chin* with her) (*Lobo & Associates*) for the respondents.

Abdul Kadir Sulaiman JCA (delivering judgment of the court): This is an appeal from the decision of the High Court dismissing the application of the appellant for certiorari to quash the award of the second respondent, Mahkamah Perusahaan Malaysia, No 132 of 1997 dated 25 March 1997. The said award arose out of a reference made by the Minister of Human Resources, Malaysia under s 20(3) of the Industrial Relations Act 1967 ('the Act') relating to the dismissal of the first respondent, Maimunah bte Ahmad, by the appellant, effective from 26 March 1992.

According to the term of the award, 'It is the court's decision that from the totality of the evidence adduced, the company (the appellant here) only based on suspicion and speculation to charge the claimant (the first respondent here), and as such, their decision to dismiss the claimant was totally baseless without just cause and excuse'.

The events leading to the dismissal of the first respondent by the appellant are that following an internal investigation carried out, the first respondent was made to appear before the appellant's board of inquiry on 11 and 12 February 1992 on two charges as follows:

1 That you received RM400 from Aladdin bin Mohd Hashim, knowing that this sum was part of the money received from the company's contractors, Oilfield Resources Sdn Bhd or its representatives in return for assistance rendered in relation to payment of that contractor's invoice in contravention of the company's gift and entertainment policy and the conflict of interest policy.

2 That you concealed and failed to disclose to the company's management, the existence of irregular business practices and/or violations by employees and/or yourself, of the above mentioned company's policies.

The internal board of inquiry, after a hearing, found both charges against the first respondent proved. Following that, by a letter dated 26 March 1992, the appellant informed the first respondent that the management 'views the gravity of your misconduct very seriously and after due consideration, has decided to terminate your employment with the company with immediate effect'.

Before the High Court, in support of the application for certiorari, the appellant based its grounds on rejection of certain evidence and wrong application of the burden of proof by the second respondent, and on jurisdictional errors committed in the course of the hearing before it leading to the making of the award.

The learned judge, in disposing the matter, gathered from his grounds of judgment, after laying out the facts of the case, commented that the charges meted out against the first respondent before the domestic inquiry. Having said that the two charges are criminal or semi-criminal in nature. The learned judge went on:

> To come back to the two charges proffered against the first respondent, they did not contain the particulars of date, time and place the offences were alleged to have been committed. They are material particulars which must be stated in the charges.
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> It is trite law that in a criminal or quasi-criminal charge, the burden of proof is always placed on the prosecution or the party that alleges. And as I had said earlier, it is also the duty of the prosecution to frame a charge and ensure that all the material particulars, including date, time and place of the alleged offence are contained in the charge. In other words, on the wordings of the charge as framed, the first respondent would be able to know exactly when the alleged offences were committed by her. The applicant (the appellant here) could not and must not assume that the first respondent knew all the particulars in respect of the charges. As regard the two charges proffered against the first respondent, the applicant failed to state the date, time and place the offence was alleged to have been committed by the first respondent. The failure of stating such material particulars would render the charges bad. It must be pointed that in a criminal or quasi-criminal case, defects to the charge may be raised at any level of the hearing. That the defect was not raised during the hearing at the lower court or tribunal does not prevent the matter from being raised at the higher level. As I have said, it is the duty of the prosecution to frame a proper charge. The fact that the accused had not raised it at the original hearing of the Domestic Inquiry would not validate the defective charge. A defective charge for want of material particulars is void ab initio. On such improper charges, the finding of guilt of the first respondent by the board of inquiry should be set aside thereby rendering the dismissal of the first respondent unlawful.

Before us, the learned counsel for the appellant contends that this issue was irrelevant for the learned judge to consider because the first respondent admitted and did not dispute either during the domestic inquiry or during the proceedings before the second respondent that she had received RM400 in the form of a cheque from Haji Aladdin, which she cashed and therefore, the merits should be considered. We do not think that we could agree with the contention of the learned counsel. The issue here is whether the first respondent in the first place was dismissed by the appellant on 26 March 1992 with just cause or excuse. If it is, the award of the second respondent cannot stand. Section 20(1) of the Act states:

> Where a workman, irrespective of whether he is a member of a trade union of workman or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; …

In the present case of the first respondent, this provision of the Act was invoked leading to the matter being placed before the second respondent. For the appellant, to justify the dismissal, it is settled law that the burden is on it to satisfy the tribunal empowered to adjudicate the matter that such

dismissal was with just cause or excuse. It is not for the first respondent to prove otherwise, see *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, where at p 136, Raja Azlan Shah CJ (Malaya) (as His Highness then was) said:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

That case cited clearly laid down the principle that in an enquiry pursuant to s 20 of the Act, the burden is upon an employer to satisfy the court that the dismissal of its workman was with just cause or excuse. In the present appeal before us, it cannot be disputed that the dismissal of the first respondent by the appellant was based on the findings of the internal board of inquiry that both charges as mentioned earlier preferred against the first respondent had been proved. For that reason alone the first respondent was dismissed by the appellant.

So, the validity or otherwise of the charges put before the internal board of inquiry is the pivotal issue in this matter. The issue being one of law, the learned judge is correct when he said that it could be raised at any stage of the proceedings in the matter. Looking at the two charges labeled against the first respondent during the inquiry leading to the findings of the board, resulting in the dismissal of the first respondent by the appellant, they are indeed criminal or at least semi-criminal in nature, the consequence of which would deprive the first respondent of her right to livelihood as indeed had happened to her by being dismissed from her employment with the appellant (see *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1995] 1 MLJ 481). Hence, the substance relating to the two charges cannot be brushed aside as being of no significance. Taking the words of the learned counsel for the appellant in his submission that the first respondent admitted and did not dispute, either during the domestic inquiry or during the proceedings before the second respondent, that she had received the money and cashed it, and there was also in the evidence a statement recorded from her during the investigation stage. At least from the purported statement, surely the date, time and place the offences were alleged to have been committed would have been known to enable proper charges to be framed against her. On the two charges, the burden is on the party that alleges to satisfy the tribunal adjudicating the matter that the charges had been proved before the first respondent could be condemned. They are material particulars required to be disclosed in the charges. Without that, how would one accused upon the charges be able to prepare proper defences to them. Simply upon the admission and non-dispute either during the domestic inquiry or during the proceedings before the

second respondent would not entitle the learned judge of the High Court in this instance, to proceed to consider the merits of the case. The validity or otherwise of the charges is the threshold of the matter before the merits could be considered. Looking at the two charges as they stood, we would not hesitate to say that they are bad and the learned judge was therefore, correct when he said that such charges for want of the material particulars is void an initio. With that, we agree with the learned judge that on such improper charges before the board of inquiry, the finding of guilt upon the first respondent could not stand thereby rendering the dismissal of the first respondent by the appellant to be without just cause or excuse and therefore, unlawful. On this ground alone, this appeal of the appellant against the decision of the learned judge ought to be dismissed.

In the proceedings before the second respondent resulting in the impugned award, as the issue of the defective charges was never an issue, the second respondent decided the matter on the merits based on the evidence tendered before him. At p 14 of the impugned award, the second respondent said:

> It is the court's decision that from the totality of the evidence adduced, the company (the appellant before us) only based on suspicion and speculations to charge the claimant (the first respondent before us), and as such their decision to dismiss the claimant was totally baseless without just cause and excuse. As such, the claimant is entitled to claim backwages from the date of her dismissal dated 26 March 1992 to the last date of the hearing on 10 October 1999.

It is against this decision in the impugned award that led to the certiorari proceedings before the learned judge initiated by the appellant. Before dealing with the merits of the application in the certiorari proceedings, the learned judge from his grounds of judgment had this to say at p 4 thereof:

> Before I proceed to consider the merits of this application, I cannot help but comment on the charges made by the applicant against the first respondent. Needless to say, these charges are criminal or semi-criminal in nature. It is a basic requirement that a criminal or semi-criminal charge must contain the date, time and place the offence was alleged to have taken place. These are material particulars to be contained in the charge in order to enable the accused person to prepare his defence adequately. Without stating the particulars of date, time and place, the accused person is put in a prejudicial position to prepare his defence and answer the charge properly. It is therefore mandatory that those material particulars are stated without which the charge is bad and on such reason alone, the accused person can be discharged or acquitted of the charge. On an appeal, a finding of guilt by a lower court or tribunal based on a defective charge for want of material particulars, can reverse the finding of guilt of the lower court and acquit the accused. It is therefore of utmost importance that such charges are properly framed so that all the material particulars are stated in the charge.

To this statement of the learned judge, we agree. The two charges against the first respondent here are clearly bad for the lack of material particulars. A proper tribunal having to decide on such bad charges would not have come to the conclusion arrived at by the board of inquiry of the appellant.

But its findings are to the contrary. Upon these erroneous findings, the appellant acted to dismiss the first respondent from her employment, effective from 26 March 1992. Since this is the reason put forward by the appellant for dismissing the first respondent, it is clearly without any just cause and excuse, which would disentitle the appellant to the order of certiorari sought before the learned judge. Though the reasons for dismissing the applications were based on void charges and on the merits, the dismissal of the application for certiorari was justified.

For the reasons given above, we need not look into the merits to find fault with the findings of the learned judge in dismissing the application. On the ground of defective charges, which is the basis for the dismissal of the first respondent, we dismiss this appeal of the appellant with costs. The decision of the learned judge is affirmed. Deposits to the first respondent to the account of taxed costs.

Appeal dismissed with costs and decision of the High Court reaffirmed.

Reported by Chew Phye Aun